

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

REC'D TN
REGULATORY AUTH.
*00 AUG 10 PM 1 42

IN RE:)
BELLSOUTH TELECOMMUNICATION'S)
TARIFF FILING TO REDUCE GROUPING)
RATES IN RATE GROUP 5 AND TO) DOCKET NO. 00-00041
IMPLEMENT A 3 PERCENT LATE)
PAYMENT CHARGE.)

CLERK OF THE
EXECUTIVE SECRETARY

SECOND PETITION FOR STAY OF EFFECTIVENESS AND PETITION FOR
RECONSIDERATION

Tennessee consumers, represented by the Consumer Advocate Division, respectfully submit this Second Petition for Stay of Effectiveness and Petition for Reconsideration of the August 3, 2000 decision of the Tennessee Regulatory Authority. For cause Tennessee consumers would respectfully show:

1. That the Tennessee Regulatory Authority's August 3, 2000 purports to reverse the Initial Order of the Hearing Officer but that the Hearing Officer amended his Initial Order and the reversal pertains to a defunct Order not in effect. A copy of the amended Order is attached as exhibit "A" hereto and is incorporated by reference.
2. That the agency decision reversing an Order not in effect and approving BellSouth's tariff are material errors of fact and law.
3. That the August 3, 2000 Order of the TRA fails to cite the undisputed facts, including but not limited to whether or not BellSouth's rates for basic local exchange service were average rates on or before June 6, 1995 which included the expenses and charges associated with billing and collection and that the TRA commits material errors of fact and law by said omissions.

4. That the August 3, 2000 Order of the TRA fails to cite the undisputed facts, including but not limited to BellSouth's tariffs associated with billing and collection on June 6, 1995 and that the TRA commits material errors of fact and law by said omissions.
5. That the August 3, 2000 Order of the TRA fails to make findings of fact and that the TRA fails to make a concise and explicit statement of the underlying facts of record to support the findings in accordance with Tenn. Code Ann. § 4-5-314 (c), including but not limited to BellSouth's tariffs associated with billing and collection on June 6, 1995 and that the TRA commits material errors of fact and law by said omissions.
6. That the TRA majority reversed the Initial Order and found in favor of BellSouth without permitting the presentation of evidence or making evidentiary findings of fact regarding the sub-issues that go to the ultimate issues and commits material errors of fact and law and further that said sub-issues are listed at page 4 of the Hearing Officer's July 3, 2000 Order and page 3 of the May 26, 2000 Order of the Hearing Officer. Copies of said Orders are attached as exhibits "B" and "C" and are incorporated herein by reference.
7. That the sub-issues were not objected to by any party and should have been addressed in accordance with Tenn. Code Ann. § 4-5-306 (a)(2).
8. That the TRA committed a material error of law by failing to identify the issues it intended to review in accordance with Tenn. Code Ann. § 4-5-315 (c) because the agency decision as stated in the August 3, 2000 Order exceeded those matters presented in the Initial Order.
9. That the Tennessee Regulatory Authority approved BellSouth's tariff in the above referenced case without permitting Tennessee consumers to present or provide cross-examination

regarding any evidence in violation of the procedural and substantive due process rights of Tennessee consumers as set forth in Tenn. Code Ann. § 4-5-312 and Tenn. Code Ann. § 4-5-313 and committed material errors of fact and law.

10. That in reaching its decision the Tennessee Regulatory Authority failed to follow the procedures of Tenn. Code Ann. § 4-5-312 and Tenn. Code Ann. § 4-5-313 and violated the procedural and substantive due process rights of Tennessee consumers.

11. That the Tennessee Regulatory Authority failed to follow the procedure of Tenn. Code Ann. § 65-2-108 and Tenn. Code Ann. § 65-2-109 and violated the procedural and substantive due process rights of Tennessee consumers.

12. That the Tennessee Regulatory Authority failed to follow the procedure of Tenn. Code Ann. § 65-5-210 (a) and violated the procedural and substantive due process rights of Tennessee consumers.

13. That the Tennessee Regulatory Authority erroneously found in favor of BellSouth and against Tennessee consumers without the presentation of any evidence by BellSouth.

14. That the Tennessee Regulatory Authority majority's denial of the Initial Order of the Hearing Officer was arbitrary and capricious or clearly erroneous.

15. That the Tennessee Regulatory Authority decision exceeds the statutory authority of the agency and is based upon unlawful procedure.

16. That the Tennessee Regulatory Authority decision is contrary to the legislative intent of Tenn. Code Ann. § 65-4-125 (b) and said provision provides:

No telecommunications service provider, and no person acting on behalf of any telecommunications service provider, shall bill and collect from any subscriber to telecommunications services any charges for services to which the provider or

person acting on behalf of the provider knows or reasonably should know such subscriber has not subscribed, or any amount in excess of that specified in the tariff or contract governing the charges for such services.

17. That the Tennessee Regulatory Authority decision permits BellSouth to bill and collect charges for services it knew or should know were not ordered by consumers and that the agency commits material errors of law and fact.
18. That the Tennessee Regulatory Authority decision permits BellSouth, when acting on behalf of another telecommunications provider, to bill and collect charges for services it knew or should have known are not and were not in the tariff or contract and that the agency commits material errors of law and fact.
19. That the Tennessee Regulatory Authority decision permits BellSouth, when acting on behalf of another billing aggregator, to bill and collect charges for services it knew or should have known are not and were not in the tariff or contract and is in violation of statutory and common law and the agency committed material errors of law and fact.
20. That Tenn. Code Ann. § 65-4-125 (b) codified the common law or created new consumer rights.
21. That the TRA's decision is contrary to the legislative intent of Tenn. Code Ann. § 65-5-208 (a) (1) which provides that rates for basic local exchange service include all recurring and nonrecurring charges.
22. That the decision is contrary to Tenn. Code Ann. § 65-5-209 (f) which prohibits increases to basic local exchange service rates which include recurring and nonrecurring charges for four (4) years.

23. That the existing rate for BellSouth's basic local exchange service is an average rate which was arrived at based upon the actual payment practices of customers.
24. That the average rate permitted BellSouth was allowed "working capital" and return on the "working capital" required to "carry the note" for those who payed late.
25. That the average rate also incorporated any increase in uncollectible revenues which also caused average rate to be higher for recovery of those costs.
26. That Tennessee consumers will suffer irreparable damages upon termination of basic local exchange services if they are unable to, or do not pay, the new charge.
27. That Tennessee consumers will suffer irreparable damages if they are not permitted to reconnect basic local exchange service after termination if they are unable to, or do not, pay the new charge.
28. That one or more members of the Authority noticed and relied upon United Telephone-Southeast's late charges but that United Telephone-Southeast's late charges are not analogous because they were implemented prior to June 6, 1995. Furthermore, UTSE is UTSE, and not BellSouth.
29. That Tennessee consumers who are end users of other service providers will suffer irreparable damages if they are terminated for non-payment of BellSouth's new charge.
30. That Tennessee consumers who are end users of other service providers will suffer irreparable damages if they are not permitted to or are unable to restore their services without paying BellSouth's new charge.
31. That BellSouth's late payment charge is an extortion in violation of Tenn. Code Ann. § 65-4-122 (b).

32. That there is no dispute of material fact that the rates for basic local exchange service on June 6, 1995, and prior to the decision, are average rates which included the recurring and non-recurring cost of billing, collection and late payments.
33. That the TRA decision is anticompetitive and contrary to legislative intent because the TRA has created a right in BellSouth as a billing aggregator that other non regulated billing aggregators do not have under state law.
34. Alternatively, the TRA decision is anticompetitive and contrary to legislative intent because the TRA has created a right through BellSouth Telecommunications, in favor of its non-regulated affiliate, BellSouth Billing, and other billing aggregators do not have such a right under state law.
35. That the TRA has created a right to assess a charge in favor of BellSouth's non-regulated affiliate aggregator, BellSouth Billing, that other non-regulated affiliates can not have under state law.
36. That BellSouth Billing, incurs the cost of billing and collection, not BellSouth Telecommunications.
37. That when BellSouth Billing incurs the cost of billing and collection for other telecommunications service providers the affiliate has no right to a late payment charge under state law.
38. That there is no privity of contract between BellSouth and the end user of a "customer" for whom BellSouth bills and that the creation of privity of contract is arbitrary and capricious or clearly erroneous and is contrary to legislative intent.

39. That BellSouth is a factor of the “customer” for whom it bills and is only empowered to bill the end user and remit the funds back to the customer.
40. That BellSouth does not have the authority to modify the payment terms agreed to by the the customer and the end user.
41. That BellSouth Billing or BellSouth Telecommunications factoring service, should not be permitted to earn an additional profit from the end user on top of the compensation they receive from “customers.”¹
42. That the late fee would be an additional profit above and beyond the contractual agreement they have with the customers.
43. That BellSouth Billing and BellSouth Telecommunications is several levels removed from the end-user and provides no telecommunications service to an end user.
44. That the TRA decision changes the terms and conditions of basic local exchange service in violation of Tenn. Code Ann. § 65-5-209 (c).
45. That United Telephone-Southeast’s late payment charge was in effect prior to June 6, 1995 or is otherwise not relevant to the decision in this case.
46. That the Tennessee Regulatory Authority has no authority to exempt BellSouth Telecommunications or any of its affiliates from the application of Tenn. Code Ann. § 65-4-125.
47. That Tennessee consumers other than lifeline and linkup customers will be irreparably harmed by BellSouth’s tariff.

¹35 C.J.S. *Factors* § 22

48. That BellSouth's tariff is intended to have the effect of or will have the effect of denying services to customers for nonpayment of late charges assessed by BellSouth.

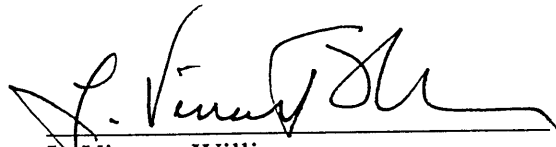
49. That Tennessee consumers who will have services denied, terminated or not restored by BellSouth because of nonpayment of late charge amounts will be denied access to 911 emergency services and will be in danger of and suffer irreparable harm to their persons and property.

50. That review of the agency decision would not provide an adequate remedy because Tennessee consumers will be irreparably harmed.

51. That the majority decision does not permit development of the record to determine whether or not the company will engage in rate discrimination in the application of BellSouth's grouping discounts and is a material error of law.

Wherefore Tennessee consumers pray that the Tennessee Regulatory Authority stay its August 3, 2000 Order and BellSouth's implementation of the late payment tariff and grants the Petition for Reconsideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "L. Vincent Williams", with a long horizontal flourish extending to the right.

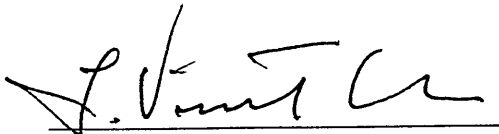
L. Vincent Williams
Deputy Attorney General - Consumer Advocate
Consumer Advocate Division
425 5th Avenue, North
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Document has been faxed and mailed postage prepaid to the parties listed below this 10th day of August, 2000.

Guy Hicks, Esq.
Patrick Turner, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300

David Waddell, Esq.
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505



L. Vincent Williams

LATE PAYMENT CHARGE: Docket-041

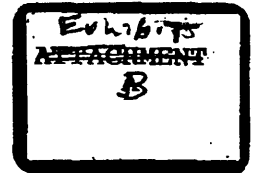
The "late payment charge" as proposed in this tariff is a "telecommunications service" for which a charge is levied.

(1) The "telecommunications service" component of the tariff is BellSouth's provision to the subscriber the benefit of paying the previous month's bill (for the underlying telecommunications services) after the next billing date without fear of immediate disconnection, for which a charge of 3% of the unpaid balance is added to the subscriber's bill.

If this tariff is approved as filed, one cannot subscribe to any telephone service without being subject to it, whether one utilizes this service or not. On June 6, 1995 and when it became subject to price regulation, BellSouth provided this service/benefit to subscribers without adding 3% to the subscriber's bill.

(2) The "charge" component of the tariff is the 3% of the unpaid balance, once it is added to the bill.

The late payment charge in this tariff becomes a rate increase at the time the 3% charge is added to the bill, because once added, the rate of the underlying telecommunication service increases by 3%. Therefore, if the late payment charge in this tariff were to be applied to "basic local exchange telephone services", it would constitute an impermissible rate increase by violating the 4-year freeze in the price regulation statute.



BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 3, 2000

IN RE:)	
)	
TARIFF FILING BY BELL SOUTH)	
TELECOMMUNICATIONS, INC.,)	DOCKET NO.
TO REDUCE GROUPING RATES)	00-00041
IN RATE GROUP 5 AND IMPLEMENT)	
A 3 PERCENT LATE PAYMENT CHARGE)	

**INITIAL ORDER RELATIVE TO OBJECTION TO
SECOND REPORT AND RECOMMENDATION**

This matter came before the Tennessee Regulatory Authority ("Authority") at a regularly scheduled Authority Conference held on June 6, 2000, prior to the consideration of the *Second Report and Recommendation of the Pre-Hearing Officer* ("Second Report"). The Second Report was filed on May 26, 2000 and is attached to this Order as Exhibit 1. On May 31, 2000, the Consumer Advocate Division ("CAD") filed an *Objection to Report and Recommendation of Hearing Officer* ("CAD's Objection"). On June 2, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a *Response of BellSouth Telecommunications, Inc. to the Consumer Advocate Division's "Objection to Report and Recommendation of Hearing Officer"* ("BellSouth's Response to CAD's Objection").

At the June 6th Authority Conference, the CAD requested the opportunity to reply to BellSouth's Response to CAD's Objection and made an oral motion to continue the consideration of the Second Report until after filing such a reply. After reviewing the

Second Report as well as the filings of the parties and hearing the parties arguments during the June 6th Conference, a majority of the Directors of the Authority granted the CAD's request to file a reply and motion to continue.¹ The Directors then remanded to the Pre-Hearing Officer the determination of the CAD's Objection, BellSouth's Response to CAD's Objection, and any subsequent reply filed by the CAD no later than 12:00 Noon on June 8, 2000. On June 8, 2000, the CAD timely filed a *Reply to BellSouth's Response to Tennessee Consumer's Objection to Second Report and Recommendation* ("CAD's Reply"). Filed pursuant to the remand of the Authority, this Initial Order memorializes the Pre-Hearing Officer's determination of the objections in these filings.

Background

On January 21, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a tariff to reduce the grouping rates in Rate Group 5 (Memphis and Nashville metropolitan areas) and to impose a three percent (3%) late charge on the unpaid balances of all customers' bills. At the February 15, 2000 Authority Conference, the Directors appointed a Pre-Hearing Officer to prepare this matter for hearing. A Pre-Hearing Conference was held on March 15, 2000.

As a consequence of this first Pre-Hearing Conference, BellSouth and the Consumer Advocate Division jointly submitted the following prime issues on March 22, 2000, which were subsequently approved by the Directors at the April 11, 2000 Authority Conference:

1. Does the late payment charge proposed in BellSouth's Tariff 00-00041 constitute an impermissible rate increase for basic local exchange service under Tenn. Code Ann. § 65-5-209?

¹ Director Greer voted to approve the Pre-Hearing Officer's report and against the CAD's motion.

2. When BellSouth bills for services on behalf of other telecommunications companies, does it have a right, independent of its agreement with the telecommunications companies for which it bills, to charge its proposed late payment charge to the consumer, in the event a consumer pays the bill late?

In response to various objections to discovery and motions to compel by both parties, a second Pre-Hearing Conference was held on May 16, 2000, before Gary Hotvedt, Counsel, designated as Pre-Hearing Officer. The parties in attendance were:

BellSouth Telecommunications, Inc. – Patrick Turner, Esq., 333 Commerce Street, 22nd Floor, Nashville, TN 37201-3300;

Consumer Advocate Division of the Office of the Attorney General – L. Vincent Williams, Deputy Attorney General, Consumer Advocate Division, 425 Fifth Avenue, North, Second Floor, Nashville, TN 37243.

During the second Pre-Hearing Conference, the Pre-Hearing Officer determined that the two-agreed-upon prime issues in this matter were essentially legal in nature and that resolution of threshold legal questions would dictate the direction of this proceeding and may determine the result of this docket. The Pre-Hearing Officer determined that the Authority's decision relative to these legal questions would determine the parties' need for certain disputed discovery responses. To that end, the Pre-Hearing Officer directed that briefs be filed addressing these threshold legal questions and determined that resolution of outstanding discovery disputes be held in abeyance until all briefs were filed and the Authority addressed the legal questions raised in this matter.

In addition to the two previously agreed-upon prime issues, the parties requested to brief certain sub-issues to help clarify their respective positions. After discussion with the parties, the Pre-Hearing Officer allowed for the submission and briefing of such sub-issues for purposes of clarification. Pursuant to a filing of May 18, 2000, BellSouth submitted the following proposed sub-issue:

Does any action the Public Service Commission may have taken with regard to costs associated with late payments during the 1993 rate case involving BellSouth (Earnings Investigation of South Central Bell Telephone Company, 1993-1995, TPSC Docket 92-13527) have any bearing on the application of T.C.A. § 65-5-209 to BellSouth's proposed late payment charge?

On May 18, 2000, the CAD submitted the following proposed sub-issues:

1. Did the General Assembly, when it compelled incumbent and local exchange companies applying for price regulation to add services to the basic local exchange classification, change or diminish the relationship between the then existing service provided and the rates for those services provided?
2. Does Tenn. Code Ann. § 65-5-208(a)(1)'s inclusion of all recurring and nonrecurring charges existing in rates, mean that all recurring and nonrecurring charges associated with basic local exchange service are covered, including but not limited to rates or charges associated with billing, collection and late payments for basic local exchange service?
3. Were the basic local exchange service rates in effect for BellSouth on June 6, 1995 based in part upon the consideration of recurring and nonrecurring expenses arising from billing, collection and late payments for those services?
4. Were the provisions of Tenn. Code Ann. § 65-5-209(f) enacted for the purpose of preserving the relationship between the rates for basic local exchange service and also the service provided at those rates?
5. When a telecommunications service provider enters into a contract with a consumer and sells that contract to BellSouth or BellSouth purchases that contract, does BellSouth's purchase of the contract unilaterally create any relationship with the customer other than BellSouth's right to receive payments in accordance with the contract?

At the second Pre-Hearing Conference, the Pre-Hearing Officer determined that both parties file briefs relative to the above prime issues and sub-issues with the Authority by 2:00 p.m., Tuesday, May 30, 2000, and reply briefs were to be filed with the Authority by 2:00 p.m., Monday, June 5, 2000. On May 30, 2000, BellSouth filed a *Brief of BellSouth Telecommunications, Inc Addressing the Issues Presented in this Docket* ("BellSouth Brief") and the CAD filed *Briefed Issues* ("CAD's Brief"). On June 5, 2000,

BellSouth filed a *Reply of BellSouth Telecommunications, Inc. to the CAD's Briefed Issues* ("BellSouth's Reply Brief"). On June 6, 2000, the CAD filed a *Motion for Extension of Time to File Reply Brief*, which was granted as a result of the Authority's granting of the CAD's motion to continue. The CAD then filed a *Response to Brief of BellSouth* ("CAD's Response Brief").

Determination of the Pre-Hearing Officer

In essence, both the CAD's Objection and the CAD's Reply (to the Second Report) argue that the Pre-Hearing Officer did not permit discovery because he "believed that discovery of facts are not necessary to the resolution of those issues." (CAD's Reply, p. 1) Begging to differ with the CAD, but as stated in the Second Report and earlier in this Initial Order, the Pre-Hearing Officer is of the opinion that resolving certain questions of law will circumscribe the issues in this docket, and thereby determine what discovery "is relevant to the subject matter in the pending action." Rule 26.02(1), Tenn. R. Civ. P. Throughout Section II of BellSouth's Response to CAD's Objection, BellSouth agrees with the Pre-Hearing Officer; to wit, the title of Section II: "Requiring briefs on the controlling legal issues prior to ruling on the discovery disputes in this docket is as appropriate as it is logical, and it certainly does not infringe upon the due process rights of any party to this docket."²

The first prime issue in this docket requires a determination of how a statute, Tenn. Code Ann. § 65-5-209, applies to a tariff, and that tariff's subsequent compliance with the

² BellSouth's Response to CAD's Objection, p. 2. While referring to the first threshold legal issue in this docket -- whether the proposed tariff constitutes an impermissible rate increase for basic local exchange service under Tenn. Code Ann. § 65-5-209 -- BellSouth states: "This issue, therefore is a purely legal one involving the application of law to the undisputed language of the tariff." *Id.* at 3.

law hinges on an interpretation of certain terms contained in that statute. In *Schleicher v. Founders Security Life Insurance Co.*, the court remarked that “[i]t is well settled that compliance or noncompliance with a statute is a question of law” 1999 WL 64233 (Tenn. Ct. App.); see e.g., *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998)(citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998)). “The content meaning and application of statutes and regulations are not a matter of fact to be proven by the affidavit of an expert witness, but are a matter of law to be presented by brief and argument of counsel supported by citations and authorities.” *Dempsey v. Correct Mfg. Corp.*, 755 S.W.2d 798, 806 (Tenn.App.1988). The Pre-Hearing Officer finds that certain issues in this docket are legal in nature, and should be decided as a matter of law prior to ruling on the outstanding motions to compel discovery. Therefore, pursuant to Tenn. Code Ann. § 4-5-306(b), the Pre-Hearing Officer has considered the arguments raised in both BellSouth’s and the CAD’s Brief as well as the rejoinders raised in BellSouth’s Reply Brief and the CAD’s Response Brief, and hereby renders this Initial Order on certain threshold questions of law raised in this docket.

In its Brief, BellSouth denies that “the late payment charge is a rate for a telecommunications service to which price regulation statutes apply” (BellSouth Brief, p. 2). To support that contention, BellSouth argues that “the late payment charge is not a rate or charge for any telecommunications service” (*Id.*, footnote 2). The Pre-Hearing Officer disagrees. First, this adjunct charge is intertwined and inextricably linked to BellSouth’s telecommunications services. The late payment charge, as proposed by BellSouth, is derived from and then applied as a charge to its telecommunications services, and therefore must be considered part of such telecommunications services.

Next, late charges do not stand-alone and could never be imposed upon customers without first providing the underlying, interrelated communications services.³ Further, if the tariff were approved, a customer could not refuse to abide by the imposition of late charges and still be entitled to receive telecommunication service. Finally, failure to pay the late charge, if imposed, could result in termination of the telecommunications service. Therefore, the Pre-Hearing Officer finds that the late payment charge proposed in BellSouth's tariff is a "telecommunications service" to which Tenn. Code Ann. § 65-5-208 and 209 apply.

The next legal issue to determine is whether a late payment charge is a rate increase. The answer to this question is obvious. If the late charge is not imposed, it is not a rate increase; however, once it is imposed, it is an increase. A hypothetical example shows this best: assume that for the past four years, John Smith has been billed \$12.15 a month, which is billed on the 1st of each month. Mr. Smith's payment is not late until the 1st of the following month. Mr. Smith receives his salary at the end of each month and

³ The argument that late charges do not stand alone, but are inextricably related to the underlying telecommunications service, is best analogized by the following questions asked last August by BellSouth's counsel:

BellSouth: Mr. Buckner, you've bought a car in the past, haven't you?
A: Yes, sir.
BellSouth: And when you buy a car, you usually have options you can add to the car, right?
A: Yes, sir.
BellSouth: Now, you can buy a car and put on antilock brakes, or power windows, or a rear defogger, can't you?
A: I've heard about 'em.
BellSouth: But you don't hear about many people walking into a car dealership and saying, I would like to buy a power window, please, do you?
A: No, sir.
BellSouth: You've kind of got to have a car to make that power window mean something, don't you?
A: Typically.

In re: Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc., in Tennessee, Transcript of Proceedings, p. 278 (August 18, 1999).

promptly mails his payment for his previous month's phone bill, which arrives at BellSouth a few days after it was late. To date, BellSouth has given him the benefit of the "float".⁴ If the proposed tariff in this docket is approved, as of the 1st of the month immediately after service was rendered, a three percent (3%) late charge will be imposed on the unpaid balance. Therefore, on the 1st of such a month, Mr. Smith will then have to pay \$12.51, which obviously is an increase in his rate.

Whether or not this rate increase is considered impermissible under Tenn. Code Ann. § 65-5-209 depends on whether the charge is applied to basic or non-basic services, as set out by Tenn. Code Ann. § 65-5-208. The purpose of the charge is not relevant here, the application of the charge is what must be considered. In the hypothetical involving John Smith (above), if the \$12.15 represents charges for "basic local exchange telephone service," then the charge would be a rate increase for basic local exchange service in violation of the statutory four-year freeze imposed under price regulation. *See* Tenn. Code Ann. § 65-5-209).⁵ Therefore, as proposed in BellSouth's tariff, the late payment charge as it applies to basic telephone services would result in rate increases that violate the basic rate freeze in Tenn. Code Ann. § 65-5-209(f).

One last issue that needs to be addressed. While fishing is always a part of the discovery process, the Pre-Hearing Officer is of the opinion that any such fishing should be done with a pole and not with a drag net. Notwithstanding that, the burdensome nature of certain requests may be a questionable defense, but the utter lack of relevancy does prevail

⁴ As used here, "float" is the value of paying after the next billing date and before service is disconnected.

⁵ In Docket No. 95-02614, *Application of BellSouth Telecommunications, Inc. for a Price Regulation Plan*, the Authority accepted BellSouth's proposal to freeze rates for basic local exchange services until December 1, 2002.

in this situation. On page 4 of BellSouth's Response to CAD's Objection, BellSouth addresses the CAD's fishing expedition:

Similarly, the CAD has taken the position that actions the former Public Service Commission may have taken during the 1993 rate case involving BellSouth with regard to costs associated with late payments has some impact on BellSouth's tariff. In fact, many of the discovery disputes involve the relevance of this position [footnote omitted]. Whether any such action the Public Service Commission may have taken under rate-of-return regulation has any impact on BellSouth's current tariff filing under price regulation, however, is a purely legal issue. It makes great sense, therefore, to determine this legal issue prior to deciding whether BellSouth must respond to burdensome discovery requests regarding the Public Service Commission's actions during the 1993 rate case.⁶

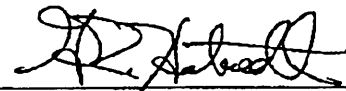
The CAD's argument that rates set by the Public Service Commission in 1993 covered the billing and collecting expense for delinquent subscribers is simply not relevant. BellSouth's entry into price regulation in 1995/98 used a different standard for setting its rates. BellSouth's offer to offset the revenue gained by the charge for the late payment service, heretofore not separately priced, ameliorates any argument of a windfall to BellSouth. As long as late payments are charged for non-basic services and they do not exceed the aggregate revenue cap, i.e., are revenue neutral, the price regulation statute is not violated.

IT IS THEREFORE ORDERED THAT:

1. As proposed in the Tariff Filing by BellSouth Telecommunications, Inc., to Reduce Grouping Rates in Rate Group 5 and Implement a 3 Percent Late Payment, the Pre-Hearing Officer finds that as a matter of law:

⁶ BellSouth's Response to CAD's Objection, p. 4.

- (a) the late payment charge is a "telecommunications service" and subject to Tenn. Code Ann. § 65-5-208 and 209;
 - (b) when applied, the late payment charge constitutes a rate increase;
 - (c) when such a rate increase is applied to basic local exchange telephone service, it would violate the basic rate freeze specified in Tenn. Code Ann. § 65-5-209(f); and
 - (d) action by the Public Service Commission is not relevant to the application of the price regulation statute;
- 2. The Consumer Advocate Division's objections to the Second Report and Recommendation of the Pre-Hearing Officer are overruled;
 - 3. This Initial Order may be appealed to the Tennessee Regulatory Authority at the July 11, 2000 regularly scheduled Authority Conference;
 - 4. If no party appeals this Initial Order or the Authority takes no action, it will become a final order fifteen (15) days after its entry; and
 - 5. A final order in this matter may be appealed to the Court of Appeals, Middle Section, within sixty (60) days of such order becoming final.



Gary R. Hotvedt
Pre-Hearing Officer

ATTEST:



K. David Waddell, Executive Secretary

EXHIBIT

68

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 26, 2000

100-00041-23 FR 5 20

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IN RE:

TARIFF FILING BY BELL SOUTH
TELECOMMUNICATIONS, INC.,
TO REDUCE GROUPING RATES
IN RATE GROUP 5 AND IMPLEMENT
A 3 PERCENT LATE PAYMENT CHARGE

DOCKET NO.
00-00041

SECOND REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

On January 21, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a tariff to reduce the grouping rates in Rate Group 5 (Memphis and Nashville metropolitan areas) and to impose a three percent (3%) late charge on the unpaid balances of all customers' bills. At the February 15, 2000 Authority Conference, the Directors appointed a Pre-Hearing Officer to prepare this matter for hearing. A Pre-Hearing Conference was held on March 15, 2000.

As a consequence of this first Pre-Hearing Conference, on March 22, 2000, BellSouth and the Consumer Advocate Division ("CAD") jointly submitted the following prime issues, which were approved by the Directors at the April 11, 2000 Authority Conference:

1. Does the late payment charge proposed in BellSouth's Tariff 00-00041 constitute an impermissible rate increase for basic local exchange service under Tenn. Code Ann. § 65-5-209?
2. When BellSouth bills for services on behalf of other telecommunications companies, does it have a right, independent of its agreement with the

telecommunications companies for which it bills, to charge its proposed late payment charge to the consumer, in the event a consumer pays the bill late?

In response to various objections to discovery and motions to compel by both parties, by Notice of May 10, 2000, a second Pre-Hearing Conference was scheduled for May 16, 2000. The Notice specified that this Pre-Hearing Conference intended to address the following items:

1. Resolution of discovery disputes; and
2. Establishing a schedule to completion.

Second Pre-Hearing Conference

The second Pre-Hearing Conference was held on May 16, 2000, before Gary Hotvedt, Counsel, designated as Pre-Hearing Officer. The parties in attendance were:

BellSouth Telecommunications, Inc. – Patrick Turner, Esq., 333 Commerce Street, 22nd Floor, Nashville, TN 37201-3300;

Consumer Advocate Division of the Office of the Attorney General – L. Vincent Williams, Deputy Attorney General, Consumer Advocate Division, 425 Fifth Avenue, North, Second Floor, Nashville, TN 37243.

While attempting to resolve the various discovery disputes, it became clear to the Pre-Hearing Officer that the two agreed-upon prime issues in this matter were essentially legal in nature, and that resolution of threshold legal questions would dictate the direction of this proceeding, and may determine the result of this docket. At a minimum, the Authority's decision relative to these legal questions would determine the parties' need for certain discovery responses, which are currently in dispute. Therefore, the Pre-Hearing Officer directed that briefs be filed addressing these threshold legal questions, and determined that resolution of outstanding discovery disputes be held in abeyance until all briefs are filed and the Authority addresses the legal questions raised in this matter.

In addition to the two agreed-upon prime issues, the parties requested to brief certain sub-issues to help clarify their respective positions. After discussion with the parties, the Pre-Hearing Officer allowed for the submission and briefing of such sub-issues for purposes of clarification. Pursuant to a filing of May 18, 2000, BellSouth submitted the following proposed sub-issue:

Does any action the Public Service Commission may have taken with regard to costs associated with late payments during the 1993 rate case involving BellSouth (Earnings Investigation of South Central Bell Telephone Company, 1993-1995, TPSC Docket 92-13527) have any bearing on the application of T.C.A. § 65-5-209 to BellSouth's proposed late payment charge?

On May 18, 2000, the CAD submitted the following proposed sub-issues:

1. Did the General Assembly, when it compelled incumbent and local exchange companies applying for price regulation to add services to the basic local exchange classification, change or diminish the relationship between the then existing service provided and the rates for those services provided?
2. Does Tenn. Code Ann. § 65-5-208(a)(1)'s inclusion of all recurring and nonrecurring charges existing in rates, mean that all recurring and nonrecurring charges associated with basic local exchange service are covered, including but not limited to rates or charges associated with billing, collection and late payments for basic local exchange service?
3. Were the basic local exchange service rates in effect for BellSouth on June 6, 1995 based in part upon the consideration of recurring and nonrecurring expenses arising from billing, collection and late payments for those services?
4. Were the provisions of Tenn. Code Ann. § 65-5-209(f) enacted for the purpose of preserving the relationship between the rates for basic local exchange service and also the service provided at those rates?

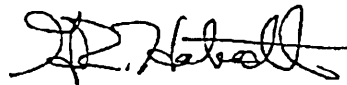
5. When a telecommunications service provider enters into a contract with a consumer and sells that contract to BellSouth or BellSouth purchases that contract, does BellSouth's purchase of the contract unilaterally create any relationship with the customer other than BellSouth's right to receive payments in accordance with the contract?

At the Pre-Hearing Conference, the Pre-Hearing Officer determined that both parties file briefs relative to the above prime issues and sub-issues with the Authority by 2:00 p.m., Tuesday, May 30, 2000, and reply briefs are to be filed with the Authority by 2:00 p.m., Monday, June 5, 2000.

The Pre-Hearing Officer recommends that upon receipt and review of both parties' briefs, the Authority schedule an opportunity for the presentation of oral arguments and deliberations on the legal questions raised in this docket.

Recommendations

- (1) The Pre-Hearing Officer recommends that the Authority approve this report, and
- (2) The Pre-Hearing Officer recommends that this tariff be re-suspended for an additional thirty (30) days to allow adequate time for hearing.



Gary Hotvedt, Pre-Hearing Officer

ATTEST:



K. David Waddell, Executive Secretary

Legdata/GRH/PHO-report-0-41

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

AUGUST 3, 2000

IN RE:)	
)	
TARIFF FILING BY BELL SOUTH)	
TELECOMMUNICATIONS, INC.,)	DOCKET NO.
TO REDUCE GROUPING RATES)	00-00041
IN RATE GROUP 5 AND IMPLEMENT)	
A 3 PERCENT LATE PAYMENT CHARGE)	

ORDER REVERSING INITIAL ORDER AND APPROVING TARIFF

This matter came before the Tennessee Regulatory Authority ("Authority") at a regularly scheduled Authority Conference held on July 11, 2000, upon the consideration of the *Initial Order Relative to Objection to Second Report and Recommendation* ("Initial Order") of the Pre-Hearing Officer in this matter. The Initial Order was filed on July 3, 2000 and follows this Order as Attachment A. The *Second Report and Recommendation of Pre-Hearing Officer* ("Second Report") was filed on May 26, 2000 and is attached to Attachment A as Exhibit 1.

On May 31, 2000, the Consumer Advocate Division ("CAD") filed an *Objection to Report and Recommendation of Hearing Officer* ("CAD's Objection"). On June 2, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a *Response of BellSouth Telecommunications, Inc. to the Consumer Advocate Division's "Objection to Report and Recommendation of Hearing Officer"* ("BellSouth's Response to CAD's Objection"). At the June 6, 2000 Authority Conference, the CAD requested the opportunity to reply to

BellSouth's Response to CAD's Objection and made an oral motion to continue the consideration of the Second Report until after filing such a reply. A majority¹ of the Directors granted the CAD's request and motion, and then remanded to the Pre-Hearing Officer the determination of the objection, response, and any subsequent reply. The Pre-Hearing Officer was specifically directed to memorialize such determination in an initial order; such Initial Order is the subject of this Order.

After reviewing the Initial Order and hearing the parties' arguments during the July 11th Conference, a majority² of the Directors reversed certain findings in the Initial Order. The majority also found that the Authority may allow a late payment charge to be applied to bills for services provided by third parties, and they approved BellSouth's tariff provided that it include an exemption for Lifeline and Link-up customers.

Background

On January 21, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a tariff to reduce the grouping rates in Rate Group 5 (Memphis and Nashville metropolitan areas) and to impose a three percent (3%) late charge on the unpaid balances of all customers' bills. At the February 15, 2000 Authority Conference, the Directors appointed a Pre-Hearing Officer to prepare this matter for hearing. A Pre-Hearing Conference was held on March 15, 2000.

As a consequence of this first Pre-Hearing Conference, BellSouth and the Consumer Advocate Division jointly submitted the following prime issues on March 22, 2000, which were approved by the Directors at the April 11, 2000 Authority Conference:

¹ At the June 6, 2000 Authority Conference, Director Greer voted to approve the Pre-Hearing Officer's Second Report and against the CAD's motion.

² Director Malone stated that on the record before him, he would vote no.

1. Does the late payment charge proposed in BellSouth's Tariff 00-00041 constitute an impermissible rate increase for basic local exchange service under Tenn. Code Ann. § 65-5-209?
2. When BellSouth bills for services on behalf of other telecommunications companies, does it have a right, independent of its agreement with the telecommunications companies for which it bills, to charge its proposed late payment charge to the consumer, in the event a consumer pays the bill late?

To permit oral argument as to objections to discovery and motions to compel by both parties, a second Pre-Hearing Conference was held on May 16, 2000. During this second Pre-Hearing Conference, the Pre-Hearing Officer determined that the two agreed-upon prime issues in this matter were essentially legal in nature and that resolution of threshold questions of law would dictate the direction of this proceeding, and may determine the result of this docket. The Pre-Hearing Officer determined that the decision relative to these legal questions would circumscribe the parties' need for certain disputed discovery responses. To that end, the Pre-Hearing Officer directed that briefs and reply briefs be filed addressing these threshold legal questions, and further determined that resolution of outstanding discovery disputes be held in abeyance until all briefs were filed and the legal questions raised in this matter were addressed.

In addition to the two previously agreed-upon prime issues, the parties requested to brief certain sub-issues to help clarify their respective positions. After discussion with the parties, the Pre-Hearing Officer allowed for the submission and briefing of such sub-issues for purposes of clarification.³ The Second Report memorialized the above actions and recommended that the Authority approve them. However, with the advent of the CAD's objection to the Second Report and the granting of its motion to continue, the Pre-Hearing

³ See the Second Report for the specific sub-issues that were filed by the parties on May 18, 2000.

Officer was directed by the Authority at the June 6, 2000 Conference to consider the CAD's objection to the Second Report and to issue an initial order thereon. The Pre-Hearing Officer issued the Initial Order on July 3, 2000. The Directors considered the Initial Order during the July 11, 2000 Authority Conference, at which time they heard extensive oral arguments from the parties.

Findings and Conclusions

While the Pre-Hearing Officer made five substantive findings in the Initial Order, only two⁴ of the findings are germane to this action by the Authority and to the subsequent resolution of this docket. The first finding, 1(a), was: "the late payment charge is a 'telecommunications service' and subject to Tenn. Code Ann. §§ 65-5-208 and 209." The second finding, 1(c), was: "when such a rate increase is applied to basic local exchange telephone service, it would violate the basic rate freeze specified in Tenn. Code Ann. § 65-5-209(f)."

A majority of the Directors found that although the late payment charge is a telecommunications service, it is a "non-basic service" as defined in Tenn. Code Ann. § 65-5-208(a)(2). As such, any rate increase would not violate the basic rate freeze specified in Tenn. Code Ann. § 65-5-209(f). Further, given adequate rate reductions for other non-basic services so as to make any rate increase revenue neutral, the late payment charge as proposed in this tariff does not violate any other aspect of the price regulation plan specified in Tenn. Code Ann. § 65-5-209.

After resolving the first prime issue in this docket, a majority of the Directors then addressed the second prime issue:

⁴ Those two findings are summarized in Nos. 1(a) and 1(c) listed on page 10 of the Initial Order.

2. When BellSouth bills for services on behalf of other telecommunications companies, does it have a right, independent of its agreement with the telecommunications companies for which it bills, to charge its proposed late payment charge to the consumer, in the event a consumer pays the bill late?

An argument was tendered that the costs incurred due to the late payment of a bill should be borne by the cost-causer -- the customer who pays the bill late should pay for the resulting costs through a late payment charge. The majority agreed with this contention and further determined "that the TRA has the authority to approve BellSouth's late payment charge even if the charge will apply to the services [provided] by third parties."⁵

After resolving the second prime issue, the majority of Directors determined that customers who qualify for either the Lifeline or Link-up subsidy program should be exempt from any late payment charges imposed under this tariff. Upon BellSouth's agreement to modify its tariff for such an exemption, the majority approved the tariff with the Lifeline and Link-up exemption.

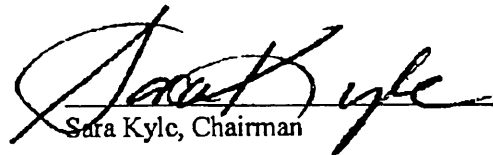
IT IS THEREFORE ORDERED THAT:

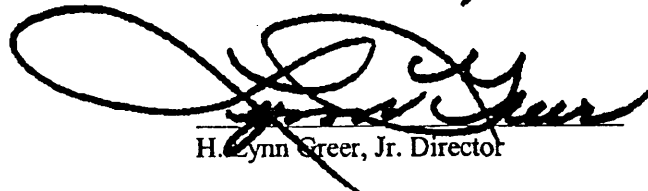
1. The Initial Order of the Pre-Hearing Officer is reversed, based upon the finding that a late payment charge is a non-basic, telecommunications service as defined in Tenn. Code Ann. § 65-5-208(a)(2);
2. Pursuant to this tariff BellSouth may apply late payment charges for services provided by third parties/other telecommunications companies for which it bills;
3. The BellSouth tariff is approved, as amended to exempt Lifeline and Link-up customers from the three percent (3%) late payment charges;

⁵ This constituted a part of Director Greer's motion at the July 11, 2000 Authority Conference, Transcript at 139.

4. Any party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order; and

5. Any party aggrieved with the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.


Sara Kyle, Chairman


H. Lynn Greer, Jr. Director

Melvin J. Malone, Director

ATTEST:


K. David Waddell, Executive Secretary

*** Director Malone voted against the prevailing motion.